PP

v.

ZHAO JINGENG & ORS

HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL REVISION NO: 43- 42-2009]
13 OCTOBER 2009

CRIMINAL LAW: *Anti-Trafficking in Persons Act 2007 - Section 51(3) - Application for revision of magistrate's order - Failure of magistrate to consider report of protection officer - Whether legal error on part of magistrate - Whether magistrate erred in releasing the 26 respondents under s. 51(3)(b)(ii) of the Anti-Trafficking in Persons Act 2007 - Criminal Procedure Code, s. 323*

The accused was arrested for an offence under the Anti-Trafficking in Persons Act 2007 ('the Act') at the Kuala Lumpur International Airport ('KLIA'). 26 citizens of the Republic of China ('China') *ie*, 17 men and nine women who were suspected to be victims of human trafficking by the accused ('the 26 respondents') were rescued by the enforcement officers of the Immigration Department. Subsequently, the accused was charged for the offence of trafficking in persons under s. 12 of the Act. The Investigating Officer of the Immigration Department ('the IO'), in his report, found that (i) genuine passports from China were changed to forged Hong Kong passports for the 26 respondents and (ii) whilst the 26 respondents were in Malaysia, they were confined to their place of accommodation. The IO then made the conclusion that the 26 respondents were trafficked persons and applied for the Interim Protection Order ('IPO') to be extended for three months for the purpose of recording the statement or deposition of the 26 respondents under s. 52 of the Act. The Magistrate in his decision/ comments stated that he agreed with the conclusion of the IO and ordered that the 26 respondents be handed over to the Immigration Department as provided in s. 51(3)(b)(ii) of the Act. The Deputy Public Prosecutor ('the DPP') submitted that the Magistrate had erred in fact and in law in making his order because if the Magistrate agreed with the IO's report and findings that the 26 respondents were trafficked persons, then the Magistrate's order

should be made under s. 51(3)(a)(ii) and not s. 51(3)(b)(ii) of the Act. Hence, the Public Prosecutor applied for revision in respect of the said order.

Held (allowing Public Prosecutor's application; setting aside order of the Magistrate):

(1) Section 51(3)(b)(ii) of the Act should not have been relied upon by the Magistrate if he agreed with the IO's conclusion that the 26 respondents were foreign nationals and trafficked persons. It was erroneous for the Magistrate to decide on the one hand that he agreed with the IO's conclusions and, on the other hand, act in a contrary manner under s. 51(3)(b)(ii) of the Act. Due to this error by the Magistrate, the 26 respondents were purportedly released. This hampered the work of the IO in proceeding to take further action under s. 52 of the Act. (para 17)

(2) The legal requirements of s. 51(3) of the Act are clear. Before making the order, the Magistrate should have read the reports of the Enforcement Officer and the Protection Officer. There was nothing in the records to show that the Magistrate had considered the report of the Protection Officer. The records showed that the Magistrate made the order after considering only the report of the IO. That was also a legal error on the part of the Magistrate. (paras 26 & 27)

(3) The Magistrate had erred in fact and in law and his decision to release the 26 respondents under s. 51(3)(b)(ii) of the Act was incorrect and improper under s. 323 of the Criminal Procedure Code. In exercising this court's powers of revision under Chapter XXXI of the CPC, the Public Prosecutor's application was allowed and the order of the Magistrate made under s. 51(3)(b)(ii) of the Act was set aside, substituting it with an order under s. 51(3)(a)(ii) of the same Act. This court ordered that the 26 respondents be placed in a place of refuge for a period not exceeding three months from the date of expiry of the IPO, to enable the enforcement officer to make the necessary application under s. 52 of the Act for the recording of their deposition or evidence before a Magistrate. (para 31)

Case(s) referred to:
PP v. Nam Oithantip [2008] 5 CLJ 285 HC ***(foll)***

Legislation referred to:
Anti-Trafficking in Persons Act 2007, ss. 12, 44(2), 51(1)(a), (b), (2), (3)(a)(ii), (b)(ii), (5), 52(1)
Criminal Procedure Code, s. 323

For the applicant - Tuan Mohd Dusuki Mokhtar DPP
For the respondents - In person

Reported by Suhainah Wahiduddin

JUDGMENT

Yeoh Wee Siam JC:

[1] This is an application for revision made by the Public Prosecutor in respect of the order made by the learned Magistrate of the Magistrate's Court, Telok Datok, Klang, Selangor ("the Magistrate").

Brief Facts

[2] On 4 August 2009 at the Kuala Lumpur International Airport ("KLIA"), Sepang, enforcement officers of the Immigration Department arrested a Malaysian, Chin Fung Chu ("the accused"), for a suspected offence under the Anti-Trafficking in Persons Act 2007 ("the Act").

[3] After the arrest of the suspect, the same enforcement officers successfully rescued 26 citizens of the Republic of China ("China") ie, 17 men and nine women who were suspected to be victims of human trafficking by the accused ("the 26 respondents").

[4] After investigations by the Immigration Department, an application was made to the Magistrate's Court, Sepang ("the Sepang Court") for an Interim Protection Order ("IPO") on 4 August 2009.

[5] The Magistrate of the Sepang Court on the same day made an IPO ordering that the 26 respondents be placed at a place of refuge for 14 days from 4 August 2009 to 17 August 2009 for the purpose of carrying out an investigation and enquiry under s. 51 of the Act.

[6] The accused was charged on 8 August 2009 for the offence of trafficking in persons under s. 12 of the Act.

[7] On 17 August 2009 the Investigating Officer of the Immigration Department ("the IO") made an application under s. 51(2) of the Act to the Magistrate's Court, Telok Datok, Klang, Selangor for a Protection Order for the 26 respondents who were suspected to be trafficked persons. In order to support the application, the IO tendered a report of his investigations. A report made by the Protection Officer under s. 52(1) of the Act was also tendered.

[8] The report of the Protection Officer was only in relation to the 9 female respondents. No report on the other 17 male respondents was made. In the report, the Protection Officer, after interviewing the 9 female respondents, concluded that the 9 female respondents are not trafficked persons but were on their way from Hong Kong to Argentina or Brazil for tourism, employment or family matters.

[9] The IO's report (Lampiran B) was in respect of all the 26 respondents. The IO reported, *inter alia*, that his investigations revealed that all travel arrangements for the 26 respondents were made in Hong Kong by an unknown agent including procuring for them 26 Hong Kong passports which do not belong to the 26 respondents. Out of the 26 passports 9 of them had been reported lost by their owners.

[10] The return air tickets and hotel accommodation in Argentina and Brazil of the 26 respondents were arranged by an agent in Hong Kong.

[11] Based on the above, the IO made the following conclusions that the 26 respondents are trafficked persons:

(i) Genuine passports from China were changed to forged Hong Kong passports for the 26 respondents;

(ii) Whilst the 26 respondents were in Malaysia, they were confined to their place of accommodation.

[12] The accused admitted to the Immigration Department that this is the third time that he was involved as the Head of the delegation to go to Argentina and Brazil. In the first two times, the

tourists from China who were brought there did not return after their tourism programme. On 1 May 2009 the accused was sent back to Malaysia from Buenos Aires as a deportee due to the loss of his passport.

[13] At the end of the IO's report, the IO applied for the IPO to be extended for three months for the purpose of recording the statement or deposition of the 26 respondents under s. 52 of the Act and also for making arrangements for obtaining the necessary travel documents for the 26 respondents from the Embassy of China in Kuala Lumpur.

[14] The Magistrate in his decision/comments stated that he agreed with the conclusion of the IO and ordered that the 26 respondents be handed over to the Immigration Department as provided in s. 51(3)(b)(ii) of the Act.

[15] The learned DPP ("the DPP") submitted that the Magistrate had erred in fact and in law in making his order. This is because if the Magistrate agreed with the IO's report and findings that the 26 respondents are trafficked persons, then the Magistrate's order should be made under s. 51(3)(a)(ii) and not s. 51(3)(b)(ii) of the Act.

[16] Section 51(3)(a)(ii) and s. 51(3)(b)(ii) of the Act provide as follows:

> 51(3) Where the Magistrate, having read the report produced under subsection (2), is satisfied that the person brought before him -
>
> (a) is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order -
>
> (i) …
>
> (ii) in the case of a trafficked person who is a foreign national, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63;
>
> (b) is not a trafficked person, the Magistrate may -
>
> (i) …

A (ii) in the case of a person who is a foreign national, order that person to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

B **[17]** From the above provisions it is clear that s. 51(3)(b)(ii) of the Act should not have been relied upon by the Magistrate if he agreed with the IO's conclusion that the 26 respondents are foreign nationals and trafficked persons. It is erroneous for the Magistrate to decide on the one hand that he agreed with the IO's conclusions and, on the other hand, act in a contrary manner under C s. 51(3)(b)(ii) of the Act and conclude that the 26 respondents are not trafficked persons and order their release. Due to this error by the Magistrate, the 26 respondents were purportedly released. This hampered the work of the IO in proceeding to take further action under s. 52 of the Act for an application to be made to the D Magistrate's Court for the recording of evidence of the trafficked persons under s. 52 of the Act.

[18] Apart from hearing the submissions of the DPP, I also heard the submissions of each of the 26 respondents. The majority of the E 26 respondents questioned why they should be detained further to give another statement when earlier on they had already given their respective statements to the Immigration Department. All of them expressed a wish to be allowed to go back to their country of origin ie, China as soon as possible without a need for further detention. F This is due to several personal reasons eg, their child has to attend school, have to take care of aged parents, family needs etc. They also asked for assistance to contact their families in China. In the event that this court makes an order for further detention, most of the respondents requested that the order be made effective from the G date of their arrest. They alleged that they had been in Malaysia since 29 July 2009 and had been arrested on the same day.

[19] I then directed the DPP to reply to the submissions of the 26 respondents. The DPP explained to all the 26 respondents that H their first statements were taken for investigation purposes but a second statement has to be taken for prosecution purposes. He also informed them that they are not the accused persons charged for any offence under the Act, but instead they are trafficked persons to be placed in a place of refuge to enable the prosecution to take I depositions of the 26 respondents so that during the prosecution proceedings of the accused later on, the 26 respondents do not have to come from China to give evidence in the court here.

[20] The DPP also informed the 26 respondents that should the depositions be completed earlier, then they can go back to their country earlier. In the meantime, the Immigration Department had already contacted the Embassy of China here for their assistance in getting the travel documents of the 26 respondents to enable them to go home.

[21] The DPP stated that the Immigration Department would assist the 26 respondents to contact their families in China as soon as possible.

[22] In deciding whether to allow the DPP's application to revise the Magistrate's order, and further, to allow an extension of time for placement of the 26 respondents under s. 51(3)(a)(ii) of the Act, I considered the report of the Protection Officer and the report of the IO to determine whether the 26 respondents are trafficked persons. The DPP cited to me the case of *PP v. Nam Oithantip* [2008] 5 CLJ 285 where Mohd Zawawi Salleh JC held that the Magistrate only referred to the report of the Protection Officer without considering the report of the IO which is required under s. 51(3) of the Act. He also held that in deciding whether a person is a trafficked person or otherwise under the Act, the report of the IO is more relevant as compared to the report of the Protection Officer. He stated that looking at the division of duties and functions under s. 51(1)(a) and (b) of the Act, the Protection Officer is only required to investigate the background of the victim.

[23] I fully agree with the decision in *PP v. Nam Oithantip (supra)*. I further state here that the whole purpose of giving an IPO for 14 days under s. 44(2) of the Act is for the purpose of carrying out an investigation and enquiry under s. 51 of the Act. This is to enable:

(a) an enforcement officer to investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person under the Act; and

(b) a Protection Officer to enquire into the background of that person.

[24] Under s. 51(2) of the Act, upon completion of the investigation and enquiry under s. 51(1) of the Act, both the enforcement officer and the Protection Officer shall prepare a report for the purpose of satisfying the Magistrate that such person is a trafficked person.

[25] Under s. 51(3) of the Act, the Magistrate, after having read the report under s. 51(2), shall make the appropriate order depending on whether he is satisfied that the person is a trafficked person or otherwise.

[26] The legal requirements of s. 51(3) are clear. Before making the order, the Magistrate should have read the reports of the enforcement officer and the Protection Officer.

[27] In the present case, the Protection Officer only made a report on 9 out of the 26 respondents. Such report is in the records of the file. However, there is nothing in the records to show that the Magistrate considered that report. The records show that the Magistrate made the order after considering only the report of the IO. That also is a legal error on the part of the Magistrate.

[28] I find that the report of the Protection Officer is incomplete since there is no report on the remaining 17 male respondents. The report on the nine female respondents informed the Magistrate that they were not trafficked persons.

[29] As in *PP v. Nam Oithantip (supra)*, I am of the opinion that the report by the enforcement officer, i.e. the IO, is more relevant here since such report is not about the background and personal information regarding the person but instead it is about whether such person is a trafficked person.

[30] Going by the report of the IO, I am satisfied that the 26 respondents are trafficked persons and the order by the Magistrate should be made under s. 51(3)(a)(ii) and not s. 51(3)(b)(ii) of the Act.

[31] I held that the Magistrate had erred in fact and in law and his decision to release the 26 respondents under s. 51(3)(b)(ii) of the Act is incorrect and improper under s. 323 of the CPC. In exercise of my powers of revision under Chapter XXXI of the CPC, I allowed the application of the Public Prosecutor. I set aside the order of the Magistrate made under s. 51(3)(b)(ii) of the Act and substituted it with an order under s. 51(3)(a)(ii) of the same Act. I ordered that the 26 respondents be placed in a place of refuge for a period not exceeding three months from 17 August 2009, ie, the date of expiry of the IPO, to enable the enforcement officer to make the necessary application under s. 52 of the Act for the recording of their deposition or evidence before a Magistrate.

[32] The above order is subject to any extension of the Protection Order of a foreign national that can be made upon application under s. 51(5) of the Act.

[33] I further ordered that the Immigration Department and the Prosecution take immediate steps under s. 52(1) of the Act to record the evidence of the 26 respondents. This is to ensure that there is no unnecessary prolonging of the stay of the 26 respondents here so that they can go back to their home country as soon as possible.